Nos. 09-1454 and 09-1478

FILED
DEC 16 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G, a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE COOK COUNTY PUBLIC GUARDIAN AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY AND SUGGESTING REVERSAL

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INTEREST OF THE *AMICUS CURIAE*[1]

INTRODUCTION

Cook County Public Guardian Robert F. Harris serves as attorney and guardian *ad litem* for more than six thousand abused, neglected, and dependent children in the Circuit Court of Cook County, Illinois, Child Protection Division. In the past 23 years, the Office of the Cook County Public Guardian has represented tens of thousands of children in abuse and neglect proceedings, as well as thousands of other children in divorce and child custody cases. *See* Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model*, 6 NEV. L.J., (Issue 3) 1284, 1284 n.1 (2006).[2] In addition, the Office of the Cook County Public Guardian has occasionally represented children as next friend in Section 1983 actions against officials of the Illinois Department of Children and Family Services (DCFS). Mr. Harris has almost two decades' experience working as an attorney and guardian *ad litem* on behalf of children in child protection cases. His staff currently numbers 270, including 143 attorneys. Mr. Harris respectfully

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *Amicus Curiae* and his counsel made a monetary contribution to this brief's preparation or submission.

[2] For information on the Cook County Public Guardian, and the additional functions of his office, *see* www.publicguardian.org.

submits this *Amicus Curiae* brief, which is not submitted on behalf of either party to this litigation, because he believes that the law articulated by the Ninth Circuit is incorrect and will unnecessarily impede child abuse investigations, thereby putting countless children across the country at greater risk of child abuse.

In the present case, the Public Guardian, based on his many years' service as attorney and guardian *ad litem* for thousands of abused and neglected children, seeks to present in this brief the important perspective of the children who will be affected by this Court's review of the Ninth Circuit's ruling. Because the "Interest of the Public Guardian" is based on his role and experience as attorney and guardian *ad litem* for abused children, he respectfully offers a brief account of the initial reports of abuse relating to his child clients in four families.[3]

THE CHILDREN'S STORIES

Lisa

Nine-year-old Lisa wrote in her diary that her father had been sexually abusing her and her five-year-old sister Sara. Lisa's friend read Lisa's diary and told her mother, who reported these facts to

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[3] The children described in this *Amicus* brief, real children in real child protection cases, have a right to confidentiality under Illinois law, 705 Ill. Comp. Stat. 405/1-8, so this *Amicus* brief alters their names, but not the facts.

Lisa's school. A school employee spoke with Lisa, who initially said that she was not allowed to talk about it, but then stated that her father had been sexually abusing her, and that her mother knows about it. At Lisa's home, a child protection investigator interviewed Lisa's mother. Lisa's mother acknowledged that Lisa had told her about the sexual abuse, that Lisa's father had confirmed the facts of the abuse to the mother, and that Lisa's father had promised at a family meeting that he would not do it again. During a subsequent victim sensitive interview (VSI) Lisa detailed years of sexual abuse. Lisa recounted that her father had vaginally penetrated her, forced her to perform oral sex, and masturbated in front of her. According to Lisa, her mother said that she and the children could not leave Lisa's father because he provided the money for the family, and that if Lisa did not want her father to abuse her, then she should not let him do it. Lisa's father confessed to the police, and said that he had told his wife that she should keep the girls away from him. Criminal cases remain pending against both parents. The child protection court placed Lisa and her sister in DCFS custody, and the children live with a foster parent who wants to adopt them.

Destiny and Jamal

Fourteen-year-old Destiny called the 911 emergency number after enduring whippings with extension cords, ironing cords, and belts over the course of six years. She had just been whipped and feared that

her mother would kill her. Police responded to find that the bodies of Destiny and three of her five siblings were all covered with marks made by extension cords. When interviewed at a hospital, Destiny's fifteen-year-old brother Jamal explained to a child protection investigator that although a child protection investigator came to the home just one week before Destiny's 911 call, the parents remained in the room while the investigator spoke with the children and that Jamal did not disclose the abuse at that time because he feared retaliation. In their parents' presence, the children denied abuse. At the hospital, the four older children reported that their parents forced the children to hold down their siblings during the whippings. The treating physician reported that the children had been whipped so often over six years that they were too afraid to report the whippings when investigators came to the home.

Michelle

Thirteen-year-old Michelle told two friends at school that her father had sexually assaulted her several months earlier, and that she feared he had impregnated her. The friends told a school counselor, who notified the child protection hotline. When a child protection investigator interviewed Michelle at school, she reported that her father had forcibly penetrated her vagina with his penis, and that she had told her mother, who declined to take any action. Concerned that the mother failed to protect her daughter, despite having known about the abuse, the

child protection investigator arranged to have a detective take Michelle for a VSI, where Michelle detailed two incidents of fondling, and repeated her account of the sexual assault. Michelle's father admitted that he had fondled and sexually assaulted Michelle when he was drunk. Michelle's mother admitted that she knew about the sexual abuse and failed to take any steps to protect her daughter. Michelle's father pleaded guilty to aggravated criminal sexual assault. Michelle lives with her maternal aunt and is doing well.

Angelica and Isaiah

The child protection hotline received a report that nine-year-old Angelica's father had beaten Angelica's mother six months earlier, and had recently shaved Angelica's head and forced her to stand outside to humiliate her. A child protection investigator went to the home and spoke to the parents. The parents admitted using corporal punishment, offered an innocuous explanation for shaving Angelica, and denied physical abuse. The parents allowed the investigator to talk with Angelica and her siblings, but only in the parents' presence. With their parents in the room, five-year-old Isaiah and Angelica denied being abused. The investigator observed marks on Angelica's eye and elbow. Angelica reported that she herself had caused the injuries. The following day Angelica visited her grandmother, who took Angelica to a doctor after noticing bleeding marks. The doctor found multiple bleeding and healing marks on

Angelica's chest, arms, torso, and backside. Away from her parents, Angelica reported that her parents had whipped her, and that her father had hit her two sisters with his hand, whipped Isaiah with a belt, and forced Isaiah to hit Angelica with an extension cord. Thereafter, both parents admitted whipping Angelica. Both parents face criminal charges. The child protection court placed the children in DCFS custody, and the children reside with a grandmother.

INTEREST OF THE *AMICUS*

Because no attorney represents the unique perspective of the children in this case, let alone the thousands of children across the country who will be affected by the Court's ruling, and because the Public Guardian believes that it is important for this Court to have the benefit of that perspective, the Public Guardian respectfully submits this brief, which will discuss the importance of a child's individual right to safety, as well as the critically important role that a child's opportunity to speak candidly about her safety concerns with school officials, child abuse investigators, and police officers plays in the practical protection of the child's right to safety. If the Ninth Circuit's reasoning were to be adopted by this Court, the safety of countless children nationwide will be made less secure.

The Public Guardian submits this brief in support of neither party, asking that this Court reverse the Ninth Circuit's opinion and instruct courts to apply

the reasonableness test of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and *Illinois v. Lidster*, 540 U.S. 419 (2004), when analyzing Fourth Amendment claims in child protection cases. This test represents an appropriate balance between parents' rights, the child's rights to safety, and the legitimate, indeed fundamental, state interests in protecting some of the most vulnerable members of our society from abuse and neglect and correctly identifying those children who cannot safely remain at home.

SUMMARY OF THE ARGUMENT

When the state investigates concerns about a child's safety, the child has an independent right to be safe and free from abuse, and to communicate about her safety. Although parents have a liberty interest in the care and control of their children, the right is not absolute, and parents have no constitutional right to be free from child abuse investigations.

In *Greene v. Camreta*, the Ninth Circuit held that an interview with a possible child abuse victim at her school constituted a seizure and violated the child's Fourth Amendment rights because the interview was conducted without a warrant, court order, parental consent, or exigent circumstances. Camreta did not contest the District Court's holding that the two hour interview of S.G. was a seizure. *Greene v. Camreta*, 588 F.3d 1011, 1022 (9th Cir. 2009). However, the Public Guardian suggests that not all interviews of possible child abuse victims by either a

child protection investigator or police officer constitute a seizure. Moreover, in its ruling, the Ninth Circuit ignored the long line of cases that held that only unreasonable searches and seizures are unconstitutional. This Court should rule that the reasonableness standard set forth in *New Jersey v. T.L.O.* and *Illinois v. Lidster* applies to child protection investigations. In such investigations, the state has a grave concern in ascertaining whether the child is abused and needs protection from her parents, or can safely remain home. Further, a well-conducted interview of the child advances the state's compelling interest in protecting children from abuse. Moreover, an interview at school does not severely interfere with the child's individual liberty. The states' use of best practices when interviewing children can greatly increase the accuracy of child protection investigations and decrease the trauma suffered by a child abuse victim. Furthermore, courts can use best practices as a guide when deciding whether a seizure during a child abuse investigation is reasonable.

ARGUMENT

I. A PARENT HAS A LIBERTY INTEREST IN HER RELATIONSHIP WITH HER CHILD, BUT THE PARENT ALSO HAS CORRESPONDING DUTIES OF CARE; AND THE STATE HAS THE RIGHT TO IMPLEMENT A CHILD PROTECTION SYSTEM TO INVESTIGATE WHETHER A CHILD CAN SAFELY REMAIN WITH THE PARENT, AND THE CHILD HAS INDEPENDENT RIGHTS TO SAFETY AND TO COMMUNICATE ABOUT HIS SAFETY.

Parents have a fundamental liberty interest in the care, custody and management of their children under the Fourteenth Amendment. *Santosky v. Kramer,* 455 U.S. 745, 753 (1982). The Court's recognition of this constitutionally-protected liberty interest reflects the law's understanding that parents ordinarily act in the best interests of their children, and that the state ought not ordinarily interject itself into that fiduciary relationship. "So long as a parent adequately cares for his or her child (i.e. is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville,* 530 U.S. 57, 68-9 (2000).

Once an allegation of abuse is made, however, there is reason to believe that the rights of the parents and the rights of the child may not always be

perfectly congruent. If proved, an allegation of abuse will constitute a violation of that fiduciary duty which the law presumes, and upon which the health and decency of society depends. Thus, "seizing" a child who might be the victim of abuse "presents a different Fourth Amendment dynamic" than seizing a chattel or a criminal suspect. *See Gates v. Texas Dept. of Protective and Regulatory Servs.*, 537 F.3d 404, 427-8 (5th Cir. 2008). In a child protection investigation, the child's rights may align with the government's interest in protecting children. *Id.* at 428. In Lisa's case, it was established that her father sexually abused her and that her mother was more concerned about maintaining the father's financial support than in protecting Lisa's right to bodily integrity and emotional well-being. In that case, Lisa's rights were more aligned with the government than with those of her parents. *See supra* at 2-3. Similarly, Michelle's rights were not aligned with those of her father, who sexually assaulted her, or with those of her mother, who knew of the abuse but failed to protect her. *See supra* at 4-5. In those cases, the parents should have no constitutional right to thwart a child protection investigation. *See United States v. Hollingsworth,* 495 F.3d 795, 802 (7th Cir. 2007) (the government had a compelling interest in speaking with a nine-year-old child based on suspicions that a parent was engaged in drug-dealing, speaking to the child at school was minimally intrusive, and violated no constitutional right of the parent).

At the outset of a child protection investigation, questioning the child does not violate any constitutionally protected liberty interest of the parent. The liberty interest that parents have with respect to the care, custody, and management of their child is a core value of our society, and the law supposes that it is one of mutual benefit. It is a liberty interest, rather than a property interest, and it presumes the existence of a relationship that exists for the beneficial development of children. Above all, the parents' liberty interest is not absolute. *Manzano v. South Dakota,* 60 F.3d 505, 510 (8th Cir. 1995). The compelling government interest in protecting children, particularly when protection is considered necessary against the parents themselves, necessarily limits the parents' liberty interest in control of their children. *K.D. v. County of Crow Wing,* 434 F.3d 1051, 1055 (8th Cir. 2006). Moreover, the right to family integrity does not include a constitutional right to be free from abuse investigations. *Hodge v. Jones,* 31 F.3d 157, 164 (4th Cir. 1994). During child abuse investigations, arbitrary abuses of government power are checked by requiring an objective justification for the steps taken during the investigation. *Terry v. Richardson,* 346 F.3d 781, 787 (7th Cir. 2003).

While every parent and child has a right to be free from "seizure," not every contact is a "seizure," and not every "seizure" is impermissible. First, not every contact with a child during a child protection investigation necessarily should be categorized as a "seizure." For example, Destiny dialed 911 after

enduring years of whippings by her mother; the contact she initiated with the police cannot reasonably be considered a seizure. *See supra* at 3-4. A court could only consider Destiny's contact as a seizure if it accepted the idea that a parent has an absolute property interest in a child, as if the child were chattel. The ability of the state to safeguard children has never been crippled by such a dubious constitutional principle and never should be.

Moreover, even if such contacts should be considered "seizures," they would not be impermissible in these circumstances. What must be recognized is that children themselves have an interest in their own safety, and thus, in truth-seeking, separate and apart from their parents, when state officials are called upon to investigate child abuse complaints. Thus, even if a child were properly to be considered "seized" during questioning aimed only at protecting her safety, the Fourth Amendment does not require a prior warrant for searches and seizures. *See California v. Acevedo,* 500 U.S. 565, 581 (1991) (Scalia, J., concurring). Rather, the Fourth Amendment only prohibits searches and seizures that are "unreasonable." *Id.*

The states, as *parens patriae*, have a strong interest in the welfare of children, including protecting children from and preventing child abuse. *Santosky v. Kramer*, 455 U.S. at 766; *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). To further this compelling interest, Illinois, like most states, has comprehensive laws and regulations governing the

investigation of child abuse. *See* 325 Ill. Comp. Stat. 5/1 *et seq.*; 89 Ill. Admin. Code 300 *et seq.*; DCFS Procedure Section 300 (2009), accessible at http://dcfswebresource.dcfs.illinois.gov. In our constitutional system of dual sovereignty, where the powers not delegated to the federal government by the Constitution nor prohibited by it to the states are reserved to the states (U.S. Const. Amend X; *Printz v. U.S.*, 521 U.S. 898, 918-9 (1997)), notions of federalism demand that the states be allowed to develop their child protection mechanisms without interference unless such mechanisms are clearly inconsistent with constitutional requirements. This is especially true for an area that has historically been of state, and not federal domain. *In re Burrus*, 136 U.S. 586, 593-4 (1890) (the subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not the laws of the United States); *United States v. Morrison*, 529 U.S. 598, 617-8 (2000) (regulation and punishment of violence, even interstate violence, that is not directed at goods involved in interstate commerce has always been the province of the states). States are in the best position to study and implement child protection systems that are consistent with best practices as developed by social scientists and researchers. *See infra* at 23-30, best practices. Unless clearly violative of constitutional norms, these systems should be entitled to substantial deference.

II. THE REASONABLENESS ANALYSIS ARTICULATED IN *NEW JERSEY V. T.L.O.* AND *ILLINOIS V. LIDSTER* SHOULD APPLY IN CHILD PROTECTION INVESTIGATIONS.

A. The Reasonableness Analysis.

This Court should apply the reasonableness standard set forth in *New Jersey v. T.L.O.* to child protection investigations. 469 U.S. at 341. In *T.L.O.*, this Court held that a search of a student at school does not need to be based on probable cause, but "simply on the reasonableness, under all the circumstances, of the search." *Id.* To be reasonable, the search must be justified in its inception, and be reasonably related to the circumstances that justified the search in the first place. *Id., citing Terry v. Ohio*, 392 U.S. 1, 20 (1968).

Likewise, in *Illinois v. Lidster*, 540 U.S. at 426-7, this Court applied the reasonableness standard to ascertain the reasonableness of limited stops of motorists, looking specifically to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[4] This standard has been applied to detention of known witnesses to crimes. *See Walker v Orem*, 451 F.3d 1139, 1150 (10th Cir. 2006) (detaining

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[4] The *Lidster* case is not cited or addressed in *Greene v. Camreta*, 588 F.3d 1011.

a family in their home for questioning, some held at gunpoint or in a squad car, was unreasonable).

In examining the reasonableness of an interview of a child in a child protection investigation, courts should consider the same three factors that this Court set forth in *Lidster*. First, the public's important interest and concern in ascertaining whether a child has been abused and needs protection from her parents or, alternatively, can safely be left at home. Second, a well-conducted interview of the child advances the public's compelling interest in protecting children from abuse.[5] Third, courts should consider the extent of interference with the child's liberty during an interview. The liberty involved is that of the child who, of course, is not free to leave school, and is in a public school setting.

In some child protection cases, the child will be questioned both by the police and child welfare professionals. The child may have witnessed a crime, but may also require protection. The most important fact is that the child, by definition, will not be the target of a criminal investigation. The child is being interviewed as a possible victim or witness, not as a person suspected of a crime. Sometimes, a criminal investigation will ensue, but the child will not be the defendant in any event. Moreover, many child protection investigations do not lead to criminal

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[5] For a description of the best practices used to help ensure a complete and accurate interview, *see infra* at 23-9.

prosecutions against anyone, and it is not possible at the beginning of an investigation to know whether that will happen in a particular case.[6] In the present case, for example, S.G. was suspected of being a victim of sexual abuse, not a criminal suspect. The fact that a deputy sheriff was present when Camreta conducted the interview did not make S.G. less of a possible victim. In these circumstances, the court below should have applied the *Lidster* and *T.L.O.* reasonableness standard.

Other circuits have applied the reasonableness standard to child abuse investigations. In *Darryl H. v. Coler*, the Seventh Circuit, citing *T.L.O*, held that the Fourth Amendment prohibits only unreasonable searches, and that the standard of reasonableness requires balancing the need to search against the invasion that the search entails. 801 F.2d 893, 900 (7th Cir. 1986). Likewise, the Tenth Circuit has observed that "A brief detention by a social services caseworker is not of constitutional dimension." *Doe v. Bagan*, 41 F.3d 571, 575 (10th Cir. 1994). The Fourth Circuit has applied the reasonableness test to reject a foster mother's claim that removing foster children

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[6] Child abuse cases are less likely to be prosecuted than most other felonies and less likely to result in incarceration. *See* Theodore P. Cross et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions,* 4 Trauma, Violence & Abuse 323, 323-24 (2003). Most sexual abuse cases substantiated by child welfare professionals do not result in prosecution. Rebecca M. Bolen, *Child Sexual Abuse: Its Scope and our Failure,* Kluwer Academic/Plenum Publishers, 166 (2001).

from her home during a child abuse investigation was a violation of the foster mother's Fourth Amendment rights. *Wildauer v. Frederick Co.*, 993 F.2d 369, 372-3 (4th Cir. 1993). Likewise, as in Michelle's case, it was reasonable for the child protection investigator to interview Michelle at her school based upon her outcry to her friends at school. *See supra* at 4.

B. Requiring a Warrant, Exigent Circumstances, or Parental Consent for State Authorities to Interview a Suspected Child Abuse Victim is Too Restrictive of the Government's Compelling Goal to Protect its Child Citizens.

The Ninth Circuit's holding unnecessarily hinders child abuse investigations and endangers abused children who are entitled to prompt and effective protection. In the present case, the Ninth Circuit held that the traditional Fourth Amendment requirements of a warrant, court order, exigent circumstances, or parental consent apply to child abuse investigations. *Greene v. Camreta*, 599 F.3d at 1030. In finding that Camreta and Alford violated S.G.'s rights to be free from an unconstitutional seizure, the Ninth Circuit rejected the use of both the reasonableness standard and the special needs doctrine. *Id.* at 1025, 1027-8, 1033.[7]

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[7] In requesting that this Court direct courts to apply a reasonableness standard when evaluating Fourth Amendment

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One of the problems with the approach adopted in the case at bar and similar cases is that obtaining a warrant or court order may be difficult if the abuse allegation is based on an anonymous or non-specific child abuse hotline call. At the outset of a child protection investigation, there may be no way for the authorities to know whether the investigation will reveal evidence of a crime that results in traditional law enforcement involvement that may implicate the Fourth Amendment. For example, if an anonymous report of child abuse alleges that an eight-year-old boy is abused because he has a large bruise on his face, the investigator may go to the school to briefly speak with the child. If the child tells the investigator that he received the bruise at soccer practice at school, the investigator can confirm this fact with the

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issues in child protection investigations, the Public Guardian recognizes that in this Court's discretion, a "special needs" exception could be created for the initial stage of child protection investigations. Traditionally, no special needs exception applies when the primary purpose of law enforcement is the prosecution of crime. *Ferguson v. City of Charleston*, 532 U.S. 67, 85-6 (2001). The Public Guardian submits that if this Court created a special needs exception for child protection cases, two important concerns relating to children would deserve consideration. First, any special needs exception should apply when child protection investigators seek police assistance for valid safety concerns, as long as the sole purpose for police involvement is not to pursue a criminal prosecution. Second, mental health professionals caution that multiple interviews can seriously traumatize a child abuse victim. *See infra* at 25. For this reason, any special needs exception should allow child protection investigators and law enforcement officers to coordinate the initial interview of a child when possible.

coach of the soccer team. If the child's explanation is corroborated by the coach, no further investigation needs to be done and the case can be closed. Requiring the child abuse investigator to first obtain a court order or warrant to speak with the child at school will expend unnecessary resources and does little to protect children or their parents from needless judicial involvement. It could also subject the family to more state intrusion, such as physical exams or more extensive questioning of the child, when the matter could be simply disposed of through the investigator's initial interview.

Moreover, the original allegation may be too vague to obtain a warrant. The facts in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) illustrate this point.[8] There, an anonymous caller made a report that she heard a child screaming "No Daddy, No" at 1:30 in the morning. *Id.* at 810. The Ninth Circuit opined that the report could mean that the father was abusing the child, or "these words are often screamed at bedtime, and also in the middle of the night . . . " and might not relate to abuse at all. *Id.* at 813. That is the inherent problem with requiring that a search warrant be obtained every time a child abuse investigator interviews a child. Many times, the information obtained from the hotline call will not rise to the level

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[8] In *Calabretta*, the Ninth Circuit found that the warrantless entry to a home to investigate child abuse violated the Fourth Amendment, especially where no emergency was shown. 189 F.3d at 813.

of an emergency or probable cause. For example, the initial hotline report regarding Angelica, whose father shaved her head to humiliate her, revealed no probable cause of abuse. *See supra* at 5. Only after speaking with the alleged victim, and possibly others, can child abuse investigators determine whether the child needs protection from abuse. As this Court observed in *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987), "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."

Also, the fact that a child abuse investigator did not immediately investigate a case does not always mean that no exigent circumstances existed. In *Greene v. Camreta*, the Ninth Circuit found that no exigent circumstances existed because Camreta and Alford waited three days to "detain and interrogate S.G." 588 F.3d at 1030, n.17. In the analysis of an emergency, delay "will not be hard to find: child welfare officers often must practice triage, deciding which endangered child must wait while another one, in seemingly greater peril, takes precedence." *Tenenbaum v. Williams*, 193 F.3d 581, 610 (2d Cir. 1999) (Jacobs, J., dissenting). If liability attaches to workers for removing a child, but no liability attaches for leaving a child in a home, the incentive "will be to allow some number of children – their constitutional rights preserved – to return home to a predatory adult." *Id.* at 611, *citing Deshaney v. Winnebago Co. Dep't of Soc. Servs.*, 489 U.S. 189, 201-2 (1989). The risk to the child does not lessen simply because child

abuse investigators delayed their initial interview with the child. *See Darryl H.*, 801 F.2d at 903, n.8. The delay may be because of overwhelming caseloads or an inept caseworker, not because exigent circumstances do not exist. Requiring strict adherence to a showing of exigent circumstances could result in many children remaining with their abusers, waiting for help that never comes.

Moreover, requiring parental consent before speaking with a child at a school could greatly impede a child abuse investigation or endanger the child. Some abusive parents will simply withhold consent. Or like Angelica and Isaiah's parents, will allow an interview but only in the parents' presence. *See supra* at 5. If the parent consents to the interview only if he can remain present, the integrity of the interview is undermined. *See infra* at 26. Many abused children refuse to disclose abuse within their abuser's hearing. Some children like Destiny and Angelica, once out of their abuser's care, report that they didn't tell the investigators who came to their home about the abuse because their parents were present. *See supra* at 3-4, 5-6. Also, by asking a parent's consent to speak with a child about abuse or neglect, the parent is alerted that an investigation is pending. This could place a child at risk of harm from a retaliatory abuser who warned the child not to disclose the abuse as in the case of Lisa, who stated that she was not allowed to talk about the abuse, or of Jamal, who didn't tell investigators about the abuse in

his parents' presence because he feared retaliation. *See supra* at 2-3, 4.

In cases where the non-offending parent does not believe that the abuse occurred or knows the abuse occurred and doesn't act to protect the child, the risk of recantation may increase if a child remains with that parent during the interview. *See infra* at 28-9. The facts in the present case show that S.G. recanted her allegations of sex abuse. After interviewing S.G. at school, she was allowed to return home. *Greene v. Camreta*, 588 F.3d at 1018. Camreta instructed the Greenes not to speak to S.G. or her sister about the abuse allegations. *Id.* However, Sarah Greene told Camreta that she had obtained an attorney to represent her husband and had talked to S.G. about the abuse allegations. *Id.* After S.G. was interviewed at the KIDS center, staff noted that S.G. may have recanted her statements in hopes of expediting her return home. *Id.* at 1019-20. Moreover, the District Court's ruling noted that K.G., S.G.'s younger sister, reported that S.G. had lied about the sex abuse, because "she overheard plaintiff [Sarah Greene] telling S.G. that she had lied." Pet. App. 60. The facts in the case at bar do not conclusively show that S.G. was pressured into recanting her statements. However, allowing a child to remain with her parents who know about abuse allegations but do not believe (or believe and don't act to protect her) raises the risk that the child may recant her statements of abuse or neglect. *See infra* at 28-9. Requiring parental consent to speak with potential child abuse victims would

frustrate the purposes of the investigation – discovering the truth and protecting children.

This Court should adopt the reasonableness test set forth in *T.L.O.* and *Lidster* to child protection investigations, reverse the ruling in *Greene v. Camreta*, and direct that courts should evaluate the facts and circumstances of a child protection investigation under a reasonableness standard.

III. SOCIAL SCIENCE RESEARCH SHOWS THAT ADHERING TO BEST PRACTICES INCREASES THE ACCURACY OF CHILD ABUSE INVESTIGATIONS, DECREASES THE TRAUMA SUFFERED BY CHILD ABUSE VICTIMS, AND SERVES THE STATE'S COMPELLING INTEREST TO REDUCE THE LONG-TERM NEGATIVE IMPACT CHILD ABUSE HAS ON SOCIETY.

"Best practices" are the most efficient methods to conduct child protection interviews that yield the most accurate information while limiting any further trauma to the child. Experts note that there is a "substantial degree of consensus regarding the ways in which investigative interviews should be conducted and a remarkable convergence with the conclusions suggested by a close review of the experimental and empirical literature." Michael E. Lamb, Yael Orbach, Irit Hershkowitz, and Phillip W. Esplin, *Structured forensic interview protocols improve the quality and informativeness of investigative interviews with*

children: A review of research using the NICHD Investigative Interview Protocol, 31 Child Abuse Neglect (Issues 11-12) 1201, 1202 (2007) [hereinafter Lamb (2007)].

The interview of an alleged child abuse victim is an essential component of any investigation, particularly in child sexual abuse cases. The American Academy of Pediatrics recognizes that approximately ninety percent of physical examinations of child and adolescent victims of sexual abuse are normal, even when penetration has occurred. Nancy Kellogg, MD and the Committee on Child Abuse and Neglect, *The Evaluation of Sexual Abuse in Children*, 116 Pediatrics (Issue 2) 506 (2005).[9] Thus, the interview of the child victim is often the most essential piece of an investigation. A majority of children with substantiated findings of sexual abuse who have not been subjected to suggestive interview techniques disclosed sexual abuse within the first or second formal investigative interview. Kamala London, Maggie Bruck, and Stephen J. Ceci, *Disclosure of Child Sexual Abuse: What Does Research Tell Us About the Ways That Children Tell?*, 11 Psychology, Public Policy, and Law (Issue 1) 194, 217 (2005). The scientific community strongly agrees about how to conduct interviews of sexually abused children to obtain the most reliable and accurate information.

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[9] Accessible at http://pediatrics.aappublications.org/content/full/116/2/506 (last visited December 7, 2010).

Debra A. Poole and Michael E. Lamb, *Investigative Interviews of Children: A Guide for the Helping Professional*, 81 (1998) [hereinafter Poole & Lamb (1998)]; Lamb (2007) at 1202. Poole & Lamb note that research on interviewing child sexual abuse victims has been the greatest source of opinion on how to conduct investigatory child interviews generally. *Id.*

Experts agree that the number, timing and context of interviews along with the technique of the interviewer are significant factors in obtaining reliable information. Empirical evidence and expert consensus strongly support limiting the number of investigatory interviews of child victims of sexual abuse whenever possible. American Academy of Child & Adolescent Psychiatry, *Guidelines for the Clinical Evaluation for Child and Adolescent Sexual Abuse*, ¶ 6 (1990).[10] The primary purposes of limiting the number of interviews are to reduce potential trauma to the child, avoid duplicative efforts by law enforcement and child welfare investigators and increase the reliability of the information obtained from the interviews. In addition, interviews should be conducted as soon as possible after alleged abuse has occurred to improve the interview's quality and usefulness. Lamb (2007) at 1232; Tom Plach, *Investigating Allegations of Child and Adolescent Sexual Abuse: An Overview for Professionals*, 79 (2008) [hereinafter Plach (2008)].

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[10] Accessible at www.aacap.org/.../guidelines_for_the_clinical_evaluation_for_child_and_adolescent_sexual_abuse (last visited December 7, 2010).

The context of the interview is also important. Ideally, the child will be interviewed alone, outside the presence of a parent, alleged perpetrator or anyone who could influence the child. Hollida Wakefield, *Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?*, 24 American Journal of Forensic Psychology (Issue 3) 57, 60-1 (2006) [hereinafter Wakefield (2006)]; Donna Pence and Charles Wilson, *The Role of Law Enforcement in the Response to Child Abuse and Neglect*, ¶ 3 (1992)[11] [hereinafter Pence (1992)]; Plach (2008) at 79-80. For example, in Illinois, DCFS procedures require that all alleged child victims must be interviewed, and if at all possible, should be interviewed out of the presence of the child's parent and the alleged perpetrator. Illinois DCFS Procedure Section 300.50(c)(8) (2009).[12] Moreover, the child's information is more credible when he is interviewed out of the presence of adults with the ability and motivation to coerce, pressure or otherwise influence the child's statement. DCFS Procedure Section 300.60(m)(4) (2009).[13] The number of people present during an interview should be limited. Pence (1992) at ¶ 1. A neutral, non-authoritarian, supportive, safe, non-distracting physical environment

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[11] Accessible at http://www.childwelfare.gov/pubs/usermanuals/law/lawf.cfm (last visited December 7, 2010).

[12] Accessible at http://dcfswebresource.dcfs.illinois.gov (last visited December 13, 2010).

[13] Accessible at http://dcfswebresource.dcfs.illinois.gov (last visited December 13, 2010).

increases the effectiveness of the interview by enhancing the child's retrieval capabilities and accuracy. *Id.* In Illinois, for example, when interviewing a child in a home where a parent's paramour lives with the family, any interview of a child should not take place with the parent or paramour present, and should take place in a neutral setting such as a school, or other place where the child feels safe. DCFS Procedure 300, Appendix H, V(a) (2004).[14]

Finally, the technique of the interviewer can greatly enhance the accuracy and reliability of the information obtained. Lamb (2007) at 1208. Good interviewing techniques can even enhance the effectiveness of interviews of children with low verbal abilities. *See generally* Jacinthe Dion and Mireille Cyr, *The use of the NICHD protocol to enhance the quantity of details obtained from children with low verbal abilities in investigative interviews: A pilot study*, 17 Journal of Child Sexual Abuse (Issue 2) 144, 144-162 (2010). Four of the most respected guidelines in investigative interviewing techniques have many features in common. Poole & Lamb (1998) at 87-99.[15] Common phases include (1) introduction, (2) building rapport, (3) practice interviewing, (4) setting ground

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[14] Accessible at http://dcfswebresource.dcfs.illinois.gov (last visited December 13, 2010).

[15] The four interview guidelines are (1) The Cognitive Interview, (2) The Step-Wise Interview, (3) The NICHD Protocol, and (4) The American Professional Society on the Abuse of Children Guidelines. *Id.*

rules, and (5) asking open-ended questions to encourage narrative answers. *Id.* Evidence shows that the most reliable and accurate information comes from encouraging a child to give a narrative response. Lamb (2007) at 1203; Michael E. Lamb, Irit Hershkowitz, Yael Orbach, and Phillip W. Esplin, *Tell me what happened: Structured investigative interviews of child victims and witnesses*, 5 (2008). A court, when deciding the Fourth Amendment implications of a child's interview by a child abuse investigator and law enforcement, should rely upon this best practice approach to determine the reasonableness of a purported seizure.

Even when an interview conforms to all known best practices, child abuse experts and courts recognize that child sexual abuse victims frequently recant their disclosures of abuse due to pressure and influence from family members. *See Artiaga v. Money*, 2006 U.S. Dist. LEXIS 46935 (N.D. Ohio, Jul. 11, 2006), *citing United States v. Provost*, 969 F.2d 617, 621 (8th Cir. 1992) ("Recantation is particularly common when family members are involved and the child has feelings of guilt or the family members seek to influence the child to change her story"); *Myatt v. Hannigan*, 910 F.2d 680, 685 (10th Cir. 1990) ("[T]he child's recanting of her statement to family members is not atypical in sex abuse cases") (citations omitted); *see also* American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse*, Sage Publications, 94 (3d ed. 2004) (noting that in intra-family sex abuse cases, the

non-offending parent "may protect the child, pressure the child not to talk about the abuse, or persuade the child to recant the disclosure so the perpetrator does not face the criminal justice system"); Elaine R. Cacciola, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 U.C.L.A. L.REV. 175, 184-8 (1986) (noting susceptibility of child victim to family pressure and to recant the testimony to return things to "normal"). In *Greene v. Camreta*, S.G.'s recantation of her initial allegation of sex abuse by her father is consistent with these expert opinions. Although the record is not complete regarding the basis for S.G.'s recantation, the conversation between S.G. and her mother overheard by K.G. is significant. *See supra* at 22.[16]

Many jurisdictions, including Illinois, have established Children's Advocacy Centers (CAC), where child abuse victims can be interviewed in a manner consistent with the known best practices, including limiting the number of times a child is interviewed. In Illinois, in certain cases, the DCFS child protection investigator is instructed to coordinate his investigation with law enforcement and Child Advocacy Centers to limit the number of times a child is interviewed. *See generally* DCFS Procedure 300.70(b)(6)(13)(ii) (2009).[17]

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[16] It should be noted that Mr. Greene pleaded guilty to abusing the seven-year-old boy who first reported abuse. *Greene v. Camreta*, 588 F.3d at 1020.

[17] Accessible at http://dcfswebresource.dcfs.illinois.gov (last visited December 13, 2010).

However, the urgent conditions of child protection investigations inevitably require an initial investigatory interview of a child. Sometimes CAC interviews can be scheduled on an emergency basis, but typically interviews are conducted within several days of the initial report of abuse. It is the child protection investigator's responsibility to determine whether or not the child can safely remain in the home pending the interview. Child protection investigators must be able to take initial investigatory steps which allow them to gather accurate and reliable information in order to protect children in a timely manner. Child protection investigations frequently require that the initial investigatory interview take place in the community where the child is located rather than more optimal settings like a CAC. However, immediate responders can still structure the interview to adhere to best practices supported by scientific research: the interview should be conducted outside the presence of the alleged perpetrator, the number of people participating in the interview should be limited and the environment should be private and structured to limit distractions.

The state not only has a compelling interest to protect abused children, but also has an interest in the negative impact child abuse has on the state when the abused children grow up. The Adverse Childhood Experiences (ACE) Study, a collaboration between the Centers for Disease Control and Prevention and Kaiser Permanente Health Plan, concluded that the frequency with which individuals experience

childhood abuse and neglect, along with other stressful events, increases the likelihood they will develop significant health and social problems.[18] Examples of these costly social and health problems are: alcoholism, chronic obstructive pulmonary disease, depression, fetal death, health-related quality of life, illicit drug use, ischemic heart disease, liver disease, risk for intimate partner violence, multiple sexual partners, sexually transmitted diseases, smoking, suicide attempts, unintended pregnancies, early initiation of smoking, early initiation of sexual activity, and adolescent pregnancy.[19] The ACE Study is consistent with other research showing an association between traumatic childhood events and mental health problems. Adults who were physically abused or neglected as children have been found to have an increased risk for major depression, and to be more likely to meet the criteria for at least one other mental disorder, such as post-traumatic stress disorder, drug dependence, dysthymia, or antisocial personality disorder.

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[18] Accessible at http://www.cdc.gov/ace/findings.htm) (last visited December 7, 2010). In this ongoing study, 17,000 participants underwent standardized physical examinations and completed confidential surveys about childhood maltreatment, family dysfunction, and current health and behavior, and then continue with ongoing assessment of their health. The results support the conceptualization of "The ACE Pyramid," which postulates that there is a trajectory leading from adverse childhood experiences, to social, emotional, and cognitive impairments, to the adoption of health-risk behaviors, to disease, disability, and social problems, to early death.

[19] *Id.*

Cathy Spatz Widom, Kimberly DuMont, and Sally J. Czaja, A *Prospective Investigation of Major Depressive Disorder and Comorbidity in Abused and Neglected Children Grown Up*, 64 Archives of General Psychiatry (Issue 1) 49, ¶ 7 (2007);[20] Kate M. Scott, Don R. Smith and Pete M. Ellis, *Prospectively Ascertained Child Maltreatment and Its Association With DSM-IV Mental Disorders in Young Adults*, 67 Archives of General Psychiatry (Issue 7) 712, ¶ 7 (2010).[21]

Use of best practices when interviewing can greatly increase the accuracy of child protection investigations and decrease the trauma suffered by a child abuse victim. Furthermore, courts should use best practices as a guide when deciding whether a seizure was unreasonable under the Fourth Amendment during a child abuse investigation.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reversed, and this Court should direct courts to recognize the child's independent rights, the states' right to implement reasonable child protection procedures, and to use the reasonableness test articulated in *New Jersey v. T.L.O.* and *Illinois v.*

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[20] Accessible at http://archpsyc.ama-assn.org/cgi/content/full/64/1/49 (last visited December 7, 2010).

[21] Accessible at http://archpsyc.ama-assn.org/cgi/content/full/67/7/712 (last visited December 7, 2010).

Lidster when deciding whether a seizure during a child protection investigation was reasonable under the Fourth Amendment.

Respectfully Submitted,

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